BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

BRYAN JACOBSON, Appellant, v. WASHINGTON STATE UNIVERSITY, Respondent.	Case No. DISM-04-0062 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair. The hearing was held at the Center for Undergraduate Education, Conference Room 512, Washington State University, Pullman, Washington, on May 17 and 18, 2005. GERALD L. MORGEN, Member, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Bryan Jacobson was present and was represented by Patrick Kirby, Attorney at Law, of Dunn & Black, P.S. Assistant Attorney General Donna Stambaugh, represented Respondent Washington State University (WSU).

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, malfeasance, gross misconduct, and willful violation of WSU and department policies and procedures and the state ethics laws. Respondent alleges Appellant inappropriately used his WSU issued corporate credit card for personal use.

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II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent Washington State University. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on June 17, 2004.

2.2 Appellant began his employment with the Public Safety Department at Washington State University as a student intern in 1988 and began working as a police officer for the department in 1990. Appellant promoted to a corporal, and in approximately 2000, he became a sergeant. As a sergeant, Appellant had the responsibility of supervising other officers. Appellant also had an integral role in the department's data forensics lab, and his duties included investigating identity thefts.

2.3 Appellant received a letter of reprimand regarding improper use of University equipment in 1999. Appellant's personnel file also reflected 19 letters of commendation.

2.4 At WSU, the Purchasing Office is responsible for distributing J.P. Morgan Chase corporate credit cards to employees who request them for travel purposes. J.P. Morgan Chase and Company contracts with the state of Washington to provide interest free, non-revolving credit accounts for state business travel. The travel cards have both the employee's name and WSU embossed on the card, and individual credit card statements are mailed directly to employees for payment. Employees are typically reimbursed for travel expenses prior to the due date on the statement, provided they turn in travel receipts in a timely manner.

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2.5 WSU's State Travel Charge Card Policy, Business Policies and Procedures Manual (BPPM) 95.03, revised in December 2002, states that charge cards may be used only for official University travel expenses. The policy requires employees to fully pay their monthly credit card bills upon receipt and states that all charges on a state travel charge card are "the personal liability of the cardholder."

2.6 RCW 42.52.160 and WSU's BPPM 20.37 preclude a state employee from using money or property under that employee's control for private benefit or gain.

2.7 The WSU Police Department Policy Manual, Chapter 5.07.00, Officer Misconduct, provides that police officers may be disciplined when the officer's off-duty activities "may reasonably be believed to undermine . . . credibility . . ."

2.8 In November 2000, Appellant was issued a J.P. Morgan Chase travel credit card. Appellant said that at the time he received his credit card, he knew the card was for work related travel. However, Appellant also believed he could charge personal items on his corporate card like any other credit card. On September 15, 2003, Appellant's credit card was renewed, and he read and signed a University travel agreement, which prohibited employees from using the credit card to make any personal purchases.

2.9 On or around December 9, 2003, J.P. Morgan Chase contacted WSU's Purchasing Office's Program Administrative Manager, Desiree Jacobsen, regarding Appellant's delinquent travel account. Appellant's account was 90 days past due with a balance of approximately $1,300, and he had been unresponsive to contacts made by J.P. Morgan Chase. A detailed report of Appellant's travel account revealed several purchases totaling $28,957.27 over a three year period from 2000 to

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2003. Out of the $28,957.27, Appellant's University related expenses totaled approximately $2,310.93, and the remaining charges were later identified as personal.

2.10 The following are some examples of Appellant's personal charges listed in a WSU Travel Transaction Detail Report from November 16, 2000, through December 2, 2003:

- Barnacle Bill's Aquarium $250.36
- Harry Ritchie Jeweler $238.90
- Sea World San Diego $80.90
- Evergreen Tire Factory $725.00
- Office Depot, Moscow, ID $83.99
- Hooters of Pasadena $21.64
- Fenix Tattoo $125.00
- Friend Finder INC $24.95

(Exhibit R-3, Attachment A)

2.11 In addition, Appellant charged software items to be used in the data forensics lab to his WSU corporate card; however, those purchases had not been authorized by the department.

2.12 Appellant's travel card transactions after September 15, 2003, reflect two purchases to Amazon.com, one late fee for $18.98, one payment in October 2003, and two payments in December 2003, bringing the account current, at which time his account was closed.

2.13 There is no dispute Appellant charged personal items on his WSU corporate credit card or that he paid the balance due in full on December 23, 2003.

2.14 Desiree Jacobsen testified that from 2000 through 2002 it was the normal practice of the Purchasing Office to include a letter explaining the proper, business use of credit cards issued to employees. However, there is no evidence Appellant ever received that letter.

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2.15 WSU Travel Transaction Detail Reports for a number of employees substantiate Appellant's claim it was commonplace for employees, including high level supervisors, to charge personal items to their WSU travel charge cards. For example, there were a number of charges made by employees to Pullman and surrounding area stores such as Safeway, Shopko, Anderson Lumber, Wal Mart, JC Penney, and Bon Marche. (Exhibits A-6 through A-9; A-16).

2.16 Furthermore, a preponderance of the credible evidence suggests there was uncertainty regarding the normal practice of WSU travel card use prior to 2003, and there was a common perception it was acceptable to charge personal items on the cards as long as the balance was paid. Additionally, the Purchasing Office does not have an internal process to monitor or audit WSU issued travel credit cards.

2.17 On January 12, 2004, Police Chief Steve Hansen, Director of Public Safety, notified Appellant of Appellant's suspected misconduct regarding use of his WSU travel credit card. Administrative Lieutenant Scott West interviewed Appellant, as well as Desiree Jacobsen, and reviewed Appellant's travel account history, concluding misconduct occurred. On February 5, 2004, Chief Hansen met with Appellant in a pre-disciplinary meeting. Appellant apologized for his improper use of the corporate travel card, indicated he was not aware of the University's policy on travel cards until September 2003, stated he did not look closely at his credit card statements, and said he was unaware there was no accrual of interest on unpaid charges. Appellant also told Chief Hansen that other employees at WSU used their corporate travel cards for personal charges but when asked by Chief Hansen, he did not disclose any specific names.

2.18 In determining the level of discipline, Chief Hansen considered Appellant's length of service and employment record, giving some weight to both his previous reprimand and letters of

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commendation. Chief Hansen also consulted with other university police chiefs regarding the nature of Appellant's misconduct. Chief Hansen testified that the mission of the department is to uphold and enforce the laws of the state. Chief Hansen stated that as a police sergeant and supervisor to other officers, he expected Appellant to understand University policies. Chief Hansen determined Appellant's actions harmed his credibility as a police sergeant and affected his ability to work with the law enforcement community investigating crimes. As a result, Chief Hansen concluded dismissal was the appropriate sanction.

2.19 By letter dated May 20, 2004, Chief Hansen, Appellant's appointing authority, notified Appellant of his dismissal effective at the end of his shift on June 7, 2004. Chief Hansen charged Appellant with neglect of duty, malfeasance, gross misconduct, and willful violation of WSU and department polices and procedures and state ethics laws for inappropriate use of his WSU issued corporate credit card between November 16, 2000, and December 2, 2003, when he charged approximately $26, 646.34 for his own personal use.

2.20 Appellant raises the argument of retaliation based on a lawsuit he filed against WSU for racial discrimination in 2000 because others who used their credit cards for personal purposes were not disciplined. However, there is no evidence to substantiate Appellant's claim he was treated differently because Appellant never provided Chief Hansen with any names of employees engaging in similar misconduct. Therefore, Chief Hansen did not have direct knowledge regarding other employees' personal use at the time he imposed Appellant's disciplinary action.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues WSU has proven the allegations in the disciplinary letter and asserts Appellant has admitted he used his corporate credit card for personal use. Respondent argues that as an investigator, supervisor, and high ranking officer, Appellant was held to a higher ethical and

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professional standard and should have understood University polices because had the responsibility of ensuring the officers he supervised were also in compliance with regulations. Respondent argues Appellant should have realized it was unacceptable to use a WSU corporate credit card for the personal benefit of having an interest free card. Respondent contends Appellant's personal use of the card was excessive and contends he saved several hundred dollars in interest the average citizen would have to pay on an individual credit card. Respondent asserts Appellant failed to comply with the cardholder agreement after September 2003 because he allowed his account to become delinquent and failed to notify his superiors of his personal usage even after he signed the agreement. Respondent contends Appellant was investigated based on his actions reported to WSU by J.P. Morgan Chase and not his claim of disparate treatment. Respondent asserts Appellant has failed to take responsibility for his misconduct and argues termination was the appropriate sanction.

3.2 Appellant admits he made personal charges on his corporate credit card but asserts he did not become aware of personal restrictions on his card until he renewed it in September 2003. Appellant argues there was a common understanding among employees at WSU that it was acceptable to use corporate cards for personal reasons as long as the statements were paid. Appellant contends WSU has not consistently enforced its policy on use of travel cards and asserts he has been treated differently and has always been held to a stricter standard. Appellant argues he accepted responsibility for his actions and asserts he wants to be treated fairly and the same as other employees who engaged in the same conduct. Appellant asserts his use of his travel card had no financial loss to the University because he paid the balance, there was no interest charged, and he paid any late fees assessed. Appellant further asserts there has been no disruption to the department and his actions did not interfere with his ability to perform his duties. Appellant argues he is a fourteen year employee with a positive work record and argues he has received numerous commendations over the years to reflect his achievements. Therefore, Appellant argues termination is unfair and unreasonable.

IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Willful violation of published employing agency or institution or Personnel Resources Board rules or regulations is established by facts showing the existence and publication of the rules or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

4.5 Appellant was a police sergeant in a supervisory capacity and, as a result, was held to a higher standard of awareness and knowledge about University policies. Even if Appellant did not fully understand the requirements of his WSU issued credit card, he should have made a reasonable assumption that a credit card received from the University for travel purposes would be for University business only. Appellant had a duty to familiarize himself with policies and ask for clarification if necessary. In addition, once Appellant signed the agreement in September 2003, he

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had an obligation to inform his supervisor his account had a balance containing personal charges. Therefore, Respondent has proven the charges of neglect of duty and willful violation of policies.

4.6 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-135 (1995).

4.7 Respondent has failed to prove Appellant engaged in an unlawful act that affected his official duties.

4.8 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

4.9 Appellant's conduct in utilizing his WSU corporate credit card for personal purposes was inappropriate and showed a lack of professional standards and poor judgment; however, there was no evidence that Appellant's conduct was flagrant or that it adversely affected the agency's ability to carry out its functions. Respondent has failed to meet its burden of proof that Appellant's conduct constituted gross misconduct.

4.10 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness of the offenses. The penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the program. An action

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does not necessarily fail if one cause is not sustained unless the entire action depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.11 There is no question Appellant inappropriately used his WSU corporate credit card for personal use. However, there was no evidence to support that prior to September 2003 the University clearly communicated to Appellant that personal purchases on his WSU corporate credit were prohibited. Therefore, we conclude that termination is too severe under the circumstances and the sanction should be modified to a demotion to the position of Police Officer, effective June 7, 2004, which is sufficient to impress upon Appellant the seriousness of his actions and provide him an opportunity to correct his behavior.

V. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Bryan Jacobson is granted in part, and his dismissal is modified to a demotion to the position of Police Officer, effective June 7, 2004.

DATED this _____ day of _____, 2005.

WASHINGTON STATE PERSONNEL APPEALS BOARD

_____
Busse Nutley, Vice Chair

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Gerald L. Morgen, Member

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